# COLORADO RIVER INDIAN TRIBES

*Colorado River Indian Reservation*

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***Submitted Online***
***at http://solareis.anl.gov***
***and via First Class Mail***

BLM Solar PEIS Project Manager
c/o Solar Energy Draft PEIS
Argonne National Laboratory
9700 S. Cass Avenue – EVS/240
Argonne, Illinois 60439

Re: Comments of the Colorado River Indian Tribes on the Draft Programmatic Agreement Regarding Solar Energy Development on Lands Administered by the Bureau of Land Management.

Dear BLM Solar PEIS Project Manager:

The Colorado River Indian Tribes ("CRIT" or "Tribes") submits the following comments on the Programmatic Agreement ("PA") Regarding Solar Energy Development on Lands Administered by the Bureau of Land Management ("Solar Energy Development Program"). These comments supplement the January 27, 2012 letter submitted by the Tribes regarding the Supplement to the Draft Programmatic Environmental Impact Statement ("PEIS") for the Solar Energy Development Program. As noted in that letter, CRIT did not timely receive a copy of the Programmatic Agreement and therefore could not provide comments on the document at that time. Therefore, CRIT requests that BLM now accept the following comments.

## I. The Benefits Afforded to Concurring Parties to the Programmatic Agreement Should Also Be Available to Indian Tribes.

The Programmatic Agreement outlines numerous benefits to Concurring Parties. In particular, BLM is required to "seek, discuss, and consider the views and recommendations of the Signatory and Concurring Parties" on the development of Solar Energy Program policies and guidelines. PA § 4(A). These policies and guidelines are crucial, as they will, among other uses, be used to set aside areas excluded from future utility-scale solar development. PA § 4(A)(I)(a)(i).

In addition, BLM will consult with all Concurring Parties on land use plan amendments developed as part of the Solar Energy Program. PA § 4(A)(2)(b). These amendments will include stipulations that "specify measures of avoidance, monitoring, or data recovery" for historic properties. PA § 4(A)(2)(a)(i)(cc). The Tribes are particularly interested in efforts by BLM to avoid or mitigate for impacts to cultural resources and should be consulted in the development of these amendments. Simply using information and results from earlier consultation efforts , as provided for in section 4(A)(2)(a)(i) of the Programmatic Agreement, is not enough.

Concurring Parties are also invited to participate in the decision to prepare a programmatic agreement for site-specific projects. Tribes, however, are only invited to participate in the development of the programmatic agreement, not the decision to prepare one in the first instance. PA § 4(B)(5)(a), (b). As noted below, the use of programmatic agreements for site-specific projects has been problematic and as such, Tribes should be consulted regarding their future use.

While Indian tribes, including CRIT, are invited to become Concurring Parties (PA at 3), numerous provisions of the Programmatic Agreement currently prevent CRIT from signing onto the agreement. In particular, the recitals to the Programmatic Agreement state that "Execution of this PA as a Concurring Party indicates participation in the Section 106 consultations and acknowledgment that the party's views were taken into consideration." *Id.* As detailed below, BLM consultation with the Tribes on both the development of the PEIS for the Solar Energy Program and the PA has been paltry at best. CRIT is therefore unwilling to make any statement indicating approval of these inadequate consultation efforts.

Second, joining the programmatic agreement as a Concurring Party would require CRIT to agree to submit comments on "any draft or proposed final Solar PEIS document, implementation of any future solar energy program or PA, or the review of activities tiered to this PA" within 30 days of receiving the document at issue. PA § 3(A)(1)(a). As noted in CRIT's comment letter on the PEIS, these shortened timelines cannot accommodate the necessary analysis of cultural resource impacts or the required government-to-government consultation under Section 106 of the National Historic Preservation Act ("NHPA"). Tribes have limited resources to expend on consultation, review, and public comment, a problem exacerbated by the sheer number of projects proposed in the ancestral homelands of CRIT's members. Moreover, CRIT stringently objects to the assumption that if no response is given to BLM, then the Concurring Party "has elected not to comment" and therefore acquiesces in project approval. PA § 3(A)(1)(a)(i). It is this assumption—that a single letter can constitute adequate "consultation"—that has rendered BLM's consultation efforts thus far completely inadequate.

The Programmatic Agreement should be revised to either give affected Indian tribes the same status as Concurring Parties or to remove the unacceptable conditions placed on Concurring Party status. Without such revisions, the Programmatic Agreement will fail to

adequately recognize the government-to-government relationship between the Federal Government and Indian tribes. 36 C.F.R. § 800.2(c)(2)(ii)(C).

Finally, the Programmatic Agreement occasionally uses the term "Consulting Party" (i.e. PA §§ 3(A), 4(A)(2)(a)(i), 4(B)(2)(c), 4(B)(4)(c)(i), 4(B)(4)(d)(i)-(ii), 4(B)(6)(a)) but does not provide a definition for the term. *See* PA Appendix A (stating that "the definitions provided at 36 C.F.R. 800.16 and in these stipulations are applicable throughout this PA" but not incorporating the definition of "consulting party" found at 36 C.F.R. § 800.2(c)). Please confirm that affected Indian tribes are included in the term "Consulting Party" and revise the Programmatic Agreement accordingly.

## II. Consultation Thus Far Has Been Inadequate.

BLM recognizes that meaningful consultation with Indian tribes is essential to the success of the Programmatic Agreement and the Program. The Programmatic Agreement states that "BLM will engage tribes in early and meaningful tribal consultation. The BLM will work with tribes at the earliest stages of the proposed undertaking . . . ." PA § 3(B). It also acknowledges that "[e]arly consultation should be especially sensitive to landscape level issues that go beyond archaeology and historic buildings and structure, such a traditional cultural properties, historic trails, [and] encampment sites . . . ." PA § 3(A)(2).

This language, however, does not match with BLM's on-the-ground approach to tribal consultation, at least in CRIT's experience. As documented in Appendix K to the PEIS, CRIT received only two letters regarding preparation of the PEIS. The first, sent June 24,2008, invites CRIT to participate as a "cooperating agency." PEIS at K-52 to 54. While the letter mentions that "government-to-government consultation will continue" (id. at K-53), the letter does not provide any specifics about that process and none have been forthcoming. The second letter, sent July I, 2009, offers only a brief invitation: "Please contact us if you would like to enter into government-to-government consultation." PEIS at K-58. The BLM has characterized the actions as "address[ing] the agency's affirmative consultation obligations, including those that pertain to Section 106 of the NHPA." Question and Answer Fact Sheet BLM-Tribal Consultation Procedures Regarding Solar Energy Development on Public Lands in Six Southwest States. ("Q&A") at 1. But *invitations* to consult via a form letter is not the same as government-to-government consultation. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1118.

While Appendix B to the PA promises to document the tribal consultation undertaken for the development of the Programmatic Agreement thus far, it is not yet available, and it is unlikely to reveal additional evidence of consultation. Tellingly, CRIT did not receive a copy of the Programmatic Agreement until after comments on both the Supplement to the PEIS and the Programmatic Agreement were already due.

Finally, while CRIT appreciates efforts by BLM to make consultation "more effective and productive," combining consultations on multiple projects or combining consultation with multiple tribes will not achieve those goals, as suggested in the Programmatic Agreement. PA § 3(B)(3). CRIT is concerned that such efforts would give short shrift to important cultural resource issues. As such, the Programmatic Agreement should allow these efforts only when Tribes are consulted on the *process itself* and agree to a modified consultation procedure.

## III. The Programmatic Agreement Should Specify a Preference for Avoidance.

The Programmatic Agreement should make clear that avoidance of important cultural resources is the preferred method of addressing potential impacts to such resources.

The Programmatic Agreement currently states that "if the BLM determines that the effect may be adverse, the BLM will make a reasonable and good faith effort to avoid or reduce adverse effects to the most reasonable and fitting extent." PA § 4(B)(4)(c)(iv). As a preliminary matter, the NHPA *requires* that BLM "avoid, minimize, or mitigate any adverse effects" to a cultural resource eligible for inclusion in the National Register of Historic Places ("NRHP") (36 C.F.R. §§ 800.5, 800.6) or to comply with the requirements outlined in 36 C.F.R. § 800.7. As such, BLM must do more than simply engage in a good faith effort to reduce adverse effects where it is "reasonable" to do so.

More importantly, CRIT does not believe that certain "mitigation" measures, such as excavation or data recovery, in any way mitigate the disturbance of their ancestors remains, funerary objects, trails, or other sacred and important artifacts. Thus, every possible effort must be made to avoid such resources. While the Programmatic Agreement acknowledges that "BLM will attempt to reach a consensus to avoid, minimize, or mitigate adverse effects to historic properties," including a consensus with Indian tribes, the PA provides no factors or criteria that BLM must satisfy in order to move forward without consensus. Given the repeated failure of BLM officials to engage with the Tribes thus far, a promise to try for consensus, without additional procedural safeguards, rings hollow.

## IV. The Programmatic Agreement Does Not Provide Procedures for Inadvertent Discoveries of Cultural Resources.

In November 2011, NextEra—the developer of the BLM's Genesis Solar Energy Project—made an "unanticipated" discovery of numerous artifacts and cultural resources during ground disturbance work. BLM's reaction to this discovery has heightened CRIT's concerns about treatment of resources considered sacred to the Tribes. Not only are the procedures in place for addressing this unanticipated discovery inadequate to ensure their protection, but BLM has run roughshod over what few protections are spelled out in the programmatic agreement and historical properties treatment plan for the Genesis Project. Given these very real concerns and the likelihood of additional unanticipated discoveries on many of the proposed and potential

utility-scale solar project sites throughout the six-state area covered by the Solar Energy Development Program, it is absolutely critical that this Programmatic Agreement give ample attention to the process that will be followed in the event of an unanticipated discovery. Instead, the Programmatic Agreement entirely fails to address this critical issue.

At the very least, the Programmatic Agreement must be revised to include the following procedural safeguards for inadvertent discoveries: (1) provision of on-site tribal monitors with halt-work authority; (2) inclusion of immediate tribal notification procedures when an inadvertent discovery is made; (3) a framework for deciding the potential significance of the newly discovered resource (including an NRHP-eligibility determination) and development of a mitigation plan that favors avoidance, both of which allow for meaningful consultation with affected Indian tribes; and (4) a procedure for resolving disagreements over additional testing, a significance determination, and the mitigation plan.

## V. Future Programmatic Agreements Should Be Allowed Only When NHPA Criteria Are Met.

In approving solar projects in California and Arizona, BLM has frequently relied on programmatic agreements to purportedly comply with Section 106 of the NHPA. CRIT is concerned that the use of a programmatic agreement at the project level improperly defers analysis of cultural resource impacts and development of adequate mitigation measures. Instead of completing additional research to determine whether a specific site would adversely impact cultural resource before project approval, a programmatic agreement allows BLM to wait until after the project is approved and begun. When cultural resources are subsequently discovered, it is too late to easily redesign the project to avoid resources, allowing BLM to claim that avoidance is "infeasible." This tactic threatens to undermine the "stop, look and listen" purpose of Section 106. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999).

Given these concerns, the Programmatic Agreement must be revised to limit when a programmatic agreement can be used for a project-specific undertaking. The Programmatic Agreement currently states that "[w]here the BLM determines that a specific proposed solar energy project has the potential to adversely affect historic properties but those effects cannot be determined prior to its approval, the BLM may elect to review a proposed solar energy project using an undertaking-specific PA pursuant to 36 C.F.R. § 800.6." PA § 4(B)(5). As a preliminary matter, programmatic agreements are authorized pursuant to 36 C.F.R. § 800.14(b), not 36 C.F.R. § 800.6.

Moreover, programmatic agreements are intended to be used only for "certain complex project situations or multiple undertakings" such as the development of the PEIS. 36 C.F.R. § 800.14(b). While a programmatic agreement can be used "where effects on historic properties cannot be fully determined prior to approval of an undertaking" (*id.* § 800.14(b)(1)(ii)), it is not

enough for BLM to simply state that they cannot make a full determination before approval. If such an interpretation were permitted, BLM could use a programmatic agreement in all circumstances, rather than only in "certain complex project situations." Instead, the Programmatic Agreement should be revised to limit BLM's use of a programmatic agreement to situations where the nature of the specific project is not yet determined (i.e. the development of a program or land use plan) and to prohibit their use for most site-specific undertakings, where, because of their more limited nature, site evaluations can and must be conducted before BLM considers approving them.

## VI. Modifications Are Needed in the Procedures for Individual Project Review.

Finally, the Programmatic Agreement outlines additional procedures for review of individual solar energy project applications. CRIT recommends modifications to a number of these procedures in order to more closely conform to the spirit and letter of the laws protecting cultural resources:

- Section 4(B)(2) outlines the procedures that will be followed when BLM determines that the Advisory Council on Historic Preservation ("ACHP") should be invited to participate in review. This procedure does not appear to include consultation with Indian tribes, in violation of Section 106 and its implementing regulations.

- CRIT supports the Programmatic Agreement's requirement regarding pre-application meetings between BLM, Indian tribes, and the project applicant. PA § 4(B). The Tribes believe that early and meaningful dialogue will potentially resolve many of the difficulties that are presented in the current approval process. However, the Programmatic Agreement should be more specific regarding the details of these meetings. When in the process must they occur? Who will determine which tribes are invited to participate? How can the Tribes be assured that these meetings will result in meaningful dialogue rather than simply pro-forma consultation? The Tribes also support BLM's suggestion regarding pre-application meetings between Indian tribes and BLM alone, given the sensitive nature of the matter to be discussed.

- The Q&A states that "New Class III cultural resource inventories for archaeological and architectural resources, as appropriate, will be *normally* be [*sic*] required for the entire APE, except where . . . reliable Class III inventory data already exists or where geomorphological or human-caused land disturbances would preclude the existence of historic properties." Q&A at 8 (emphasis added). The PA, however, states only that "if BLM decides to require less than a Class III inventory for the entire APE, the BLM will seek the views of the SHPO, Indian tribes, and any other Concurring Parties and determine the final inventory

strategy that best represents a reasonable and good faith effort to carry out appropriate identification efforts." PA § 4(B)(4)(a)(iv). The limitations provided for in the Q&A should be incorporated into the Programmatic Agreement to ensure that necessary Class III surveys are completed.

- The Programmatic Agreement states that "at pre-application or other meetings, the BLM will ask Indian tribes if they wish to be consulted for certain types of properties when the BLM proposes to make an initial determination that the property is not eligible." PA § 4(B)(4)(b)(iii). Given the limited resources of many tribes, it is possible that all affected tribes may not participate in pre-application or "other" unspecified meetings. Therefore, BLM should engage in broader outreach to ensure that all affected tribes have the opportunity to be consulted on this important issue.

## VII. The Riverside East SEZ Should Be Eliminated from the Solar Energy Development Program.

CRIT has recently been provided with two maps, prepared in conjunction with the BLM's California Desert Conservation Area ("CDCA") planning efforts in the early 1980s, that depict numerous sensitive cultural resource areas along the I-10 corridor near Blythe. While many of these resources were designated for protection under CDCA Multiple Use Class L,[1] BLM's repeated use of the CDCA plan amendment process to approve utility-scale solar projects on these areas is already seriously undermining the earlier planning efforts.

Now, the PEIS indicates that almost all of these resource areas are included within the Riverside East SEZ. It is, quite frankly, shocking that the BLM would consider *encouraging* utility-scale solar development in these areas, given the near-certain impacts to cultural resources that will result. *See* California Desert Conservation Area Cultural Resource Element Map ("This Map depicts cultural resource areas of known and predicted areas of sensitivity and significance which are most vulnerable to negative impact.").

Moreover, the several projects that have already been approved in these areas, including the Genesis Solar Energy Project, have not only caused irreparable impacts to cultural resources, but have also significantly and negatively impacted the Tribes' working relationship with BLM. In order to avoid such conflicts in the future, CRIT reiterates its request that the BLM eliminate the Riverside East SEZ from the Solar Energy Development Program.

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[1] CDCA Plan, at 13 ("Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.").

CRIT notes that BLM has committed itself to responding to each comment letter received from Indian tribes and to justifying in writing each instance where it cannot make a requested change. Q&A at 4-5. CRIT also notes that BLM has committed itself to requesting government-to-government meetings with elected tribal officials regarding the issues raised in tribal correspondence. *Id.* We appreciate these efforts and look forward to meeting with you to discuss these important issues.

Very truly yours,

COLORADO RIVER INDIAN TRIBES

Eldred Enas
Tribal Council Chairman

# CALIFORNIA DESERT CONSERVATION AREA

## Cultural Resources Element

THIS MAP DEPICTS CULTURAL RESOURCE AREAS OF KNOWN AND PREDICTED AREAS OF SENSITIVITY AND SIGNIFICANCE WHICH ARE MOST VULNERABLE TO NEGATIVE IMPACT. THESE AREAS HAVE BEEN SELECTED BY CULTURAL RESOURCE SPECIALISTS AND DO NOT REPRESENT A COMPREHENSIVE PROFILE OF ALL KNOWN AND PREDICTED CULTURAL RESOURCE AREAS IN THE C D C A.


— legend —

CULTURAL RESOURCE AREA (PREHISTORIC AND HISTORIC)

PREHISTORIC AND HISTORIC AREAS OF CRITICAL ENVIRONMENTAL CONCERN (ACEC) [1]

AREAS OF CRITICAL ENVIRONMENTAL CONCERN (ACEC)

2- SALINE VALLEY / SALT LAKE / HUNTER CYN
3- DARWIN FALLS
7- PANAMINT VALLEY
8- PANAMINT CITY
9- GREENWATER CYN
12- SALT SPRINGS
13- CLARK MOUNTAIN
14- MOUNTAIN PASS
16- BEDROCK SPRINGS
17- STEAM WELLS
18- SQUAW SPRINGS
19- BLACKWATER WELL
20- GOLDSTONE
21- BLACK MOUNTAIN
24- IRON MOUNTAIN
25- CALICO MAN SITE
27- FORT SODA
29- FORT PIUTE
31- BARREL SPRINGS
34- JUNIPER FLATS
37- IRON MOUNTAIN (ARMY CAMP)
40- CORN SPRINGS
43- COYOTE MTNS
44- PLASTER CITY
45- YUHA INTAGLIOS
47- TUMCO
48- PILOT KNOB
49- LAKE CAHUILLA



United States
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DESERT PLANNING STAFF

# CALIFORNIA DESERT CONSERVATION AREA

## Native American Element

THIS MAP SHOWS CONCENTRATED, SENSITIVE AREAS OF TRADITIONAL NATIVE AMERICAN SECULAR AND RELIGIOUS USE. MANY OTHER RESOURCES OF THIS TYPE AND SENSITIVITY OCCUR OUTSIDE THE AREAS DELINEATED, BUT WITH LOWER RELATIVE FREQUENCY.

— legend —

NATIVE AMERICAN TRADITIONAL AREA

NATIVE AMERICAN AREA OF CRITICAL ENVIRONMENTAL CONCERN (ACEC) [1]

AREAS OF CRITICAL ENVIRONMENTAL CONCERN (ACEC)

2- SALINE VALLEY / SALT LAKE / HUNTER CYN
9- GREENWATER CYN
21- BLACK MTN
35 WHITEWATER CYN
41- SALT CREEK
42- SAN SEBASTIAN MARSH
47- TUMCO
48- PILOT KNOB

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